No. 581.

Motion to substitute

FEB 20 1899
JAMES H. McKENNEY,
Clerk.

Filed Feb. 20, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

DAVID BROWN,
Appellant,
v.
CORNELIUS N. BLISS,
Secretary of the Interior.
} No. 581.

PETITION THAT SUIT BE CONTINUED AGAINST ETHAN A. HITCHCOCK.

CHARLES A. KEIGWIN,
Solicitor for Appellant.

W. B. TREADWELL,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

DAVID BROWN,
Appellant,
v.
CORNELIUS N. BLISS,
Secretary of the Interior.
} No. 581.

PETITION THAT SUIT BE CONTINUED AGAINST ETHAN A. HITCHCOCK.

Now comes the appellant in the above entitled cause, and respectfully represents to the Court that, since the docketing of said cause in this Court, Cornelius N. Bliss, the appellee therein, has resigned the office of Secretary of the Interior, and has ceased to be such officer, and that Ethan A. Hitchcock has been appointed, and has become the Secretary of the Interior, and is now performing the duties of said office.

And said appellant further respectfully represents that said suit was lawfully commenced against the said Cornelius N. Bliss, as such Secretary of the Interior; solely in relation to the discharge of his offical duties; that the same involves the title to certain land, which is claimed

by the appellant as grantee of the State of Oregon, under the swamp land grant, and is claimed by the United States to be public land of the United States, whereby the title of the United States is drawn in question, and that the same, therefore, involves only the question of such conflicting claims of title, and the duties and powers of the Secretary of the Interior with relation thereto.

And said appellant further respectfully represents that, in order to obtain a settlement of the questions so involved, it is necessary that said suit should survive and be maintained against the said Ethan A. Hitchcock as such Secretary of the Interior.

Wherefore, said appellant respectfully prays that this Court require the said Ethan A. Hitchcock to show cause before this Court, at such time as to the Court may seem meet, why the said suit should not survive and be maintained against him as such Secretary of the Interior, and that the Court thereupon order that the said suit do survive and that the same be maintained against the said Ethan A. Hitchcock, as such Secretary of the Interior, with the same effect as if he had been the original defendant therein, in accordance with the provisions of the Act of Congress entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899; but without liability for any costs incurred up to the time of such order, which costs, as against the said Hitchcock, are hereby ~~taxed~~ waived by said appellant.

CHARLES A. KEIGWIN,
Solicitor for Appellant.

W. B. TREADWELL,
Of Counsel.

FILED.
NOV 28 1898
JAMES H. McKENNEY, Clerk

Brief of Keigwin & Treadwell for Appellant.

Filed Nov. 28, 1898.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

DAVID BROWN,
Appellant,
vs.
CORNELIUS N. BLISS,
SECRETARY OF THE INTERIOR,
Appellee.

No. 581.

BRIEF FOR APPELLANT.

CHARLES A. KEIGWIN,
Washington, D. C.,
Solicitor for Appellant.

W. B. TREADWELL,
San Francisco, Cal.,
Of Counsel

CONTENTS.

PAGE

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 5

ARGUMENT: 6

The points stated 6

The Swamp Land Act a present grant 8

Present nature of grant not affected by direction for patent 9

Effect of identification by Secretary 28

Listing gives right equivalent to patent 29

Control of Land Department ceases upon listing 30

The question considered on principle 32

The case of *Michigan Land & Lumber Co.* v. *Rust* 35

The defendant's contentions 42

TABLE OF CASES.

PAGE

Bagnell v. *Broderick*, 13 Pet. 436 ..... 38, 39

Barney v. *Dolph*, 97 U. S. 652 29

Cornelius v. *Kessel*, 128 U. S. 456 ..... 40, 43

Curtner v. *U. S.*, 149 U. S. 662 28

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241 25

French v. *Fyan*, 93 U. S. 169 9

Irwin v. *S. F. Savings Union*, 136 U. S. 578 23

Knight v. *United Land Association*, 142 U. S. 161 40

Leavenworth &c. R. Co. v. *U. S.*, 92 U. S. 733 8

Locomotive Works v. *Emigrant Co.*, 164 U. S. 559 38

Michigan Land & Lumber Co. v. *Rust*, 168 U. S. 589 ..... 7, 35

Miller v. *Kerr*, 7 Wheat. 1 41

Noble v. *Union River Logging R. Co.*, 147 U. S. 165 ..... 4, 30

Orchard v. *Alexander*, 157 U. S. 372 ..... 40, 41

Parsons v. *Venzke*, 164 U. S. 89 40

Railroad Co. v. *Smith*, 9 Wall. 95 ..... 8, 10

Simmons v. *Wagner*, 101 U. S. 260 30

Stark v. *Starr*, 6 Wall. 402 29

Tubbs v. *Wilhoit*, 138 U. S. 134 24

U. S. v. *California & Oregon Land Co.*, 148 U. S. 31 34

Van Wyck v. *Knevals*, 106 U. S. 360 9

Wineman v. *Gastrell*, 53 Fed. Rep. 697 11

Wisconsin Central R. Co. v. *Price Co.*, 133 U. S. 496 24

Wright v. *Roseberry*, 121 U. S. 488 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

DAVID BROWN, *Appellant,*

vs.

CORNELIUS N. BLISS, SECRETARY OF THE INTERIOR, *Appellee.*

No.....

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District of Columbia, which sustained a demurrer and dismissed the bill for want of equity. The only question in the case is, therefore, the sufficiency of the bill.

The suit was brought against the defendant, as Secretary of the Interior, to cancel and annul a certain order made by one of his predecessors, as head of the Land Department, so far as the same relates to the lands described in the bill, and to enjoin the defendant from carrying that order into effect. The allegations of the bill are substantially as follows:

Under and in accordance with the Act of Congress of September 28, 1850, "to enable the State of Arkansas and "other States to reclaim the swamp lands within their limits," (9 Stats. 519,) and the Act of March 12, 1860, extending the provisions of the former Act to Minnesota and Oregon, (12 Stats. 3,) the State of Oregon selected certain lands as swamp and overflowed lands, made unfit thereby for cultivation, and granted to that State by the terms of those Acts.

The Secretary of the Interior (then Mr. Henry M. Teller) examined that selection of lands, and "adjudged and deter- "mined that certain of said lands so selected, including the "lands hereinafter described, were swamp and overflowed "lands, made unfit thereby for cultivation, within the mean- "ing of the Acts aforesaid," and that the same were not within any of the exceptions contained in those Acts; and, on September 16, 1882, "made out an accurate list and plats "of the lands so adjudged and determined by him to be swamp "and overflowed lands as aforesaid, and transmitted the same "to the Governor of the State of Oregon; which list was "denominated 'List number 5'."

Mr. Teller thereafter went out of office, leaving the matter in that condition; and there were then no claimants to these lands other than the State of Oregon and its grantees, and no proceeding affecting the land was then pending before him. He was succeeded by Mr. Lucius Q. C. Lamar, and the latter by Mr. William F. Vilas.

On July 26, 1880, one H. C. Owen purchased from the State of Oregon certain of these lands, described in the bill, and, by mesne conveyances, his title vested in the plaintiff, who also holds the patent of the State of Oregon therefor, issued to him as assignee of Owen.

On December 27, 1888, Mr. Vilas, as Secretary of the Interior, made an order "annulling, canceling, and revoking the "said 'List number 5' and the approval thereof, and annulling "and revoking the said judgment and determination so made "by his said predecessor in said office, the said Henry M. "Teller," and made an order "purporting to adjudge and "determine that certain of the lands described in said 'List "number 5', including the lands hereinbefore described, were "not swamp and overflowed lands within the meaning of the "Acts aforesaid."

Various proceedings were thereafter taken by the State and its grantees, before the Secretary of the Interior and in the General Land Office, to secure a reversal of the orders so made by Mr. Vilas, which proceedings came to an end within one year before the filing of the bill. After the termination of those proceedings, the defendant undertook to put in force and carry into effect these orders of Mr. Vilas, and is treating these lands as public lands of the United States and subject to entry as such, and threatens and intends to receive and to permit his subordinates in the Land Department to receive applications for and allow entries of these lands as public lands of the United States.

It is alleged that the effect of the present and intended course of conduct on the part of the defendant will be to cloud plaintiff's title, and to cause many persons to attempt to settle upon and enter these lands, as public lands, and that plaintiff will be unable to remove them or quiet his title against them without a multiplicity of suits.

The prayer of the bill is, first, for a cancelation and annullment of the order of Mr. Vilas, and, second, for an injunction restraining the defendant from executing it or carrying it into

effect, from holding these lands to be public lands or subject to entry, from receiving or acting upon any applications therefor or entries thereon, and from in any way interfering with the plaintiff's title to and enjoyment of the land.

To this bill, the defendant demurred generally for want of equity; which demurrer was sustained by the court and the bill dismissed. That decree was affirmed by the Court of Appeals.

It is, we believe, not disputed that the relief prayed for is appropriate and justified, within the rule laid down in *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, if the order so made by Mr. Vilas was not within the competence of the Secretary of the Interior. The only question, therefore, presented by the record, is whether it was competent for him, under the circumstances, to cancel his predecessor's listing of these lands, and to revoke the former determination that the lands were swamp lands.

ASSIGNMENTS OF ERROR.

1. The decree appealed from is erroneous, in adjudging that the plaintiff's bill does not contain any matter of equity entitling the plaintiff to relief against the defendant, and in affirming the decree dismissing said bill for that reason.

2. Said decree is erroneous, in this: that it appears from said bill that, by the judgment and determination of the Secretary of the Interior, made on the 16th day of September, 1882, and by his approval of the list and plats containing the lands in suit, and his transmission of the same to the Governor of the State of Oregon, the State of Oregon, and the plaintiff, as its grantee, became the owner, in equity, of the lands in suit, so that thereafter it was not within the power of the Secretary of the Interior or of any officer of the United States, effectively to revoke said judgment, determination, or approval.

3. Said decree is erroneous, in this: that it appears from said bill that the order of the Secretary of the Interior made on the 27th day of December, 1888, was in violation of law and of the rights of the plaintiff, that the enforcement of said order is contrary to equity, and that plaintiff is, in equity, entitled to relief against said order.

4. Said decree is erroneous, in this: that the decree of the Supreme Court of the District of Columbia, thereby affirmed, was erroneous, and should have been reversed.

ARGUMENT.

The question presented in this case depends, for its solution, upon the construction of the Swamp Land Act of September 28, 1850. (9 Stats. 519.) The material portions of that Act are as follows:

"Be it enacted . . . That, to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby granted to said State.

"Sec. 2. That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas; and, at the request of said Governor, cause a patent to be issued to the State therefor; and, on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof; *provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

By the subsequent Act of March 12, 1860, (12 Stats. 3,) the provisions of the former Act were extended to Oregon, and that State was required, within a limited time, to make its selections accordingly.

We contend that the effect of these Acts was to grant to the State *in præsenti*, all the lands of the description therein

mentioned; that upon the Secretary of the Interior was imposed the duty of determining what lands were of that description, and of certifying that determination to the State; that, upon such determination and certificate, the *title* to the lands, in equity if not in law, vested in the State as of the date of the grant; and that, therefore, upon the issuance of such certificate, all control of the Secretary of the Interior over the lands so certified, ceased, and there remained in him only the ministerial duty of causing a patent to be issued upon the request of the Governor.

In the recent case of *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, this Court announced certain views (not necessary to the decision of that case) adverse to our contention; but we respectfully submit that the views there expressed are contrary to the settled course of decision in this Court, which has become a rule of property, and are inconsistent with well-established legal principles.

We shall, before analyzing that case, examine the question in the light of the prior decisions of this Court; but we may here note that the opinion in that case, as to this point, proceeds solely upon that portion of the Act of 1850, which requires the issuance of a patent, and provides that, "on that patent, the fee simple . . . shall vest in" the State. From the use of that language, the Court draws the conclusion that, until a patent has issued, the entire matter remains *in fieri* and within the control of the Land Department,—thus giving no effect whatever to the "listing."

The construction and effect of this Act and of similar Congressional grants, very early engaged the attention of this Court; and the cases on the subject establish certain consistent and unvarying rules. By these decisions, it has been

settled: (1) that the words "shall be and are hereby granted" import a present and operative grant, of a dignity at least equal to that of a patent; (2) that the effect of those words is in no wise modified by a further direction that a patent shall issue, or even that the title shall vest upon such patent; (3) that when the lands granted have been identified by the Secretary, or, in the absence of action by him, by a court, the grant attaches to the land as of the date of the Act; (4) that such identification gives, at least, a vested right to a patent, which is equivalent to a patent issued; and (5) that, in such cases, the Land Department has no further control over the land. We will first examine the decisions on these points, and will then discuss the question on principle.

1. This Act operated as a Present Grant.

In *Railroad Company* v. *Smith*, 9 Wall. 95, the Court said as to this Act:

"Here is a present grant by Congress of certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their townships, ranges, and sections, to identify them as coming within it. In this respect it is precisely like the railroad grants, which only become certain by the location of the road. In fact, in this regard the swamp-land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a float, to be determined by the choice of the line of the road in future."

In *Leavenworth &c. R. R. Co.* v. *U. S.*, 92 U. S. 733, 741, the Court, speaking of a grant in aid of a railroad, said:

"It creates an immediate interest, and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly adminis-

tered every previous similar grant. *Railroad Company* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 *id.* 60; 1 Lester, 513; 8 Opin. 257; 11 *id.* 47. They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant *then* becomes certain, and by relation has the same effect upon the selected parcels *as if it had specifically described them.* In other words, the grant was a float *until* the line of the road should be definitely fixed."

In *French* v. *Fyan*, 93 U. S. 169, the Court said:

"This court has decided more than once that the swamp land act was a grant *in præsenti*, by which *the title* to those lands passed at once to the State in which they lay."

In *Van Wyck* v. *Knevals*, 106 U. S. 360, 365, with regard to a grant to a State in aid of a railroad, the Court said:

"The grant is one *in præsenti*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed.' When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense we say that the grant is one *in præsenti*. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, *and passes the title as fully as though the sections had then been capable of identification.*"

2. The present nature of the grant is not affected by a direction for a patent.

The Act construed in *Van Wyck* v. *Knevals*, *supra*, provided that the lands granted "shall inure to the benefit of "said company as follows: When the Governor of the State "of Kansas shall certify that any section of ten consecutive "miles of said road is completed, . . . then the Secre- "tary of the Interior shall issue to the said company patents " . . .; *Provided further* that if said road is not com-

" pleted within ten years from the date of the acceptance of " the grant hereinbefore made, the lands remaining unpat- " ented shall revert to the United States." The Court said, after the language quoted under the last head:

" Nor is this operation of the grant affected by the fact that patents of the United States are subsequently, upon the certificate of the governor, to be issued by the Secretary of the Interior directly to the company and not to the State. This is only a mode of divesting the State of her trust character and of passing *the legal title held by her* to the party for whose benefit the grant was made. *The legal title under the grant goes to the State*, but the equitable right vests in the company."

This question was necessarily involved in *Railroad Company* v. *Smith, supra.* There the land had not been patented, or even listed. In fact, the Secretary had failed to act at all in the matter. The Court held that, as all the lands of the description named had, in fact, been granted, the fact that any particular land was of that description could, in the absence of action by the Secretary, be proved by parol, thus showing that the grant had attached to it. The Court said:

" By the second section of the act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact, and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary *to ascertain and make out* LISTS *of these lands*, the right of the States to them could not be defeated by that delay."

That this question was in the mind of the Court in that case, is clearly shown by the dissenting opinion of Mr, Justice Clifford, who placed his dissent (p. 102) expressly on the ground that no title vested in the State prior to the issuance of the patent.

We may here remark that this question was fully discussed, and decided upon the authority of the cases we have cited, by the Circuit Court of Appeals for the Fifth Circuit, in *Wineman* v. *Gastrell*, 53 Fed. Rep. 697. There an Act of the legislature of Mississippi declared that 35,000 acres of the lands situated in a certain swamp, (which contained 35,723 acres,) "be and the same are hereby granted" to certain commissioners, who were given power to sell the lands for certain purposes, and to issue to each purchaser a certain certificate, and that, upon the presentation of such certificate, the Secretary of State should issue a patent to the purchaser. It was held that neither the fact that the grant was merely one of quantity to be taken within certain boundaries, nor the fact that patents were expressly provided for, made the grant any the less a present one, and that the title passed under the Act without any patent.

The whole subject of the construction and effect of the Act of 1850 was elaborately considered by this Court in *Wright* v. *Roseberry*, 121 U. S. 488; and we take the liberty of here quoting all that part of the opinion which relates to that Act, though thus in some degree anticipating the points to be later discussed. The Court there said:

"It does not distinctly appear what caused the District Court to change its first decision with respect to those lands, which it had originally held to be swamp and overflowed; but, as it admitted in evidence the patents of the United States, and held that they passed the title to the defendants, it probably had reached the conclusion which the Supreme Court subsequently announced, that the plaintiff could not maintain an action upon the title to swamp and overflowed lands until they had been certified as such to the State, pursuant to the fourth section of the act of Congress of July 23, 1866, 'to quiet land titles in California.' For want of such certificate, the court decided that the title to the demanded premises never vested in the State, and that she could not convey a title to the plaintiff upon

which he could maintain an action of ejectment against persons in possession under patents of the United States. This ruling constitutes the alleged error for which a reversal is sought. To determine its correctness, it will be necessary to consider the nature of the grant to the state of the swamp and overflowed lands, the proceedings taken under the laws of the state and of the United States to ascertain and define their boundaries, and the effect of the act of July 23, 1866, and of § 2488 of the Revised Statutes as confirmatory of previous segregations by the state. The following is the swamp land act of September 28, 1850: [Here follows a copy of the Act.]

"Soon after the passage of this act, the question arose as to the time the grant took effect; whether at the date of the act, or on the issue of the patent to the state upon the request of the governor, after the list and plats of the lands were made out by the Secretary of the Interior and transmitted to him. The question was one of great importance to all the states in which there were swamp and overflowed lands. These lands amounted to many millions of acres, In California alone there were, according to the reports of the Land Department, nearly two millions of acres.

"The object of the grant, as stated in the act, was to enable the several states to which it was made, to construct the necessary levees and drains to reclaim the lands; and the act required the proceeds from them, whether from their sale or other disposition, to be used, so far as necessary, exclusively for that purpose. The early reclamation of the lands was of great importance to the states, not only on account of their extraordinary fertility when once reclaimed, but for the reason that until then they were the cause of malarial fevers and diseases in the neighborhood.

"The language of the first section of the act indicates a grant *in præsenti* to each state of lands within its limits of the character described. Its words 'shall be and are hereby granted' import an immediate transfer of interest, not a promise of a transfer in the future. It was only when the other sections of the act were read that a doubt was raised as to the immediate operation of the act. On the one hand, it was contended that these sections postponed the vesting of title in the state until the lands granted were identified, and a patent of the United States for them was issued. On the other hand, it was insisted that effect must be given to the clear words of the granting clause of the first section, which, *ex vi termini*, import the passing of a present interest, and that, in consistency with them, the other provisions of the act should be regard-

ed as simply providing *the mode of identifying the lands, and furnishing documentary evidence of their identification*, and not as a limitation upon vesting the right to them in the state, *as this would make the investiture dependent upon the request of the governor, and not upon the act of Congress.* It was also urged that identification of the lands could be made in a majority of instances from simple examination of them, and that no policy of the government could be advanced by postponing the passing of the title until the identification by the Secretary of the Interior; and that the clause providing, that upon the issue of the patent the fee should pass, *was merely declaratory of the nature of the title, the patent operating merely by way of further assurance.*

"The question thus brought to the attention of the Department, under whose supervision the act was to be carried into effect, was one upon which men might very well differ, *but after its solution had been reached, and the conclusion was acted upon, necessarily affecting titles to immense tracts of land, there should be the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned.*

"There are numerous cases in the history of the country where Congress, after confirming to parties title to lands, has directed that patents of the United States should be issued to them; *yet, it has been held that the patent in such cases operated merely as record evidence of the title, and added nothing to the title itself.* An illustration of this is presented in the case of claims confirmed to lands in the Northwest Territory which originated previously to its cession to the United States. By the act of Congress of March 26, 1804, 2 Stat. 277, c. 35, every person claiming lands within certain designated limits of that territory by virtue of a legal grant made by the French government prior to the Treaty of Paris of the 10th of February, 1763; or by the British government subsequent to that period, and prior to the treaty of peace between the United States and Great Britain on the 3rd of September, 1783; or by virtue of any resolution or act of Congress subsequent to that treaty, was required to deliver, on or before the first of January, 1805, to the register of the land office of the district in which the land was situated, a notice stating the nature and extent of his claim, together with a plat of the tract or tracts claimed. The register of the land office and the receiver of public moneys were constituted commissioners within their respective districts for the purpose of examining the claims. It was made their duty to hear in a summary manner all

matters respecting them, to examine witnesses, and to take any testimony that might be adduced before them and decide thereon according to justice and equity, and to transmit a transcript of their decisions in favor of claimants to the Secretary of the Treasury, who was required to lay it before Congress at the ensuing session.

"Among the claims presented under this act was one by the heirs of Jean Baptiste Tongas for lands in the neighborhood of Vincennes, the claim being founded upon an ancient grant to their ancestor. The commissioners decided in favor of the heirs and confirmed their claim, and transmitted a transcript of their decision to the Secretary of the Treasury, who laid the same before Congress. By the act of March 3, 1807, 2 Stat. 446, c. 47, this and other decisions in favor of persons claiming lands in the same district of Vincennes, transmitted to the Secretary of the Treasury, were confirmed. The act declared that every person, or his legal representative, whose claim was confirmed, and who had not previously obtained a patent therefor from the governor of the territory northwest of Ohio, or of Indiana Territory, should, whenever his claim was located and surveyed, have a right to receive from the register of the land office at Vincennes a certificate, *which should entitle him to a patent for his land, to be issued to him in like manner as is provided by law 'for the other lands of the United States.'* A survey of the tract thus confirmed was made in 1820, but no patent was issued until 1872, when one was issued, reciting the confirmation, by the act of 1807, of the decision of the Commissioners under the act of 1804. The patent purported to 'give and grant' to the heirs of Tongas the tract in question in fee. A party claiming under the heirs brought ejectment for the premises. The defendant claimed as tenant under one who had been in actual possession under claim and color of title for thirty years. The question for decision was, when did the title to the land vest in the heirs of Tongas. The court below held that it vested by the act of confirmation of 1807, when the land was located and surveyed in 1820, and that the patent was not itself the grant of the land by the United States, but merely evidence that a grant had been made to the heirs of Tongas. The defendant, therefore, had judgment. The case being brought to this court, the judgment was affirmed. *Langdeau* v. *Hanes*, 21 Wall. 521. In deciding the case, the court said :

"'In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a

claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government. In the present case the patent would have been of great value to the claimants, as record evidence of the ancient possession and title of their ancestor, and of the recognition and confirmation by the United States, and would have obviated, in any controversies at law respecting the land, the necessity of other proof, and would thus have been to them an instrument of quiet and security. *But it would have added nothing to the force of the confirmation.* The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia.'

"The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the swamp land act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or of other disposition made before such road becomes definitely fixed. The usual words of grant in such cases are similar to those in the swamp land act—'there is hereby granted.' Though it is impossible to locate the land granted until the route is fixed, yet when that is fixed the grant takes effect as of the date of the act. This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult. Thus, in the case of *Leavenworth, Lawrence and Galveston Railroad Company* v. *United States*, 92 U. S. 733, the language was, 'There be and is hereby granted to the state of Kansas,' and in reference to it the court said: 'It creates an immediate interest and does not indicate a purpose to give in future. "There be and is hereby granted" are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant. . . . They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had

specifically described them.' See, also, *Railroad Company* v. *Baldwin*, 103 U. S. 426; *Missouri, Kansas and Texas Railway Company* v. *Kansas Pacific Railway Company*, 97 U. S. 491; *Schulenberg* v. *Harriman*, 21 Wall. 44, 60; *Rutherford* v. *Greene's Heirs*, 2 Wheat. 196.

"It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. *When identified, the title would become perfect as of the date of the act.* The patent would be *evidence* of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. The determination of the Secretary upon these matters, as shown by the patent, would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. *But the right of the state under the first section would not be enlarged by the action of the Secretary, except as to land, not swamp or overflowed, contained in a legal subdivision,* as mentioned in the fourth section; nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, *or* the patent issued, notwithstanding the delays and embarrassments which might ensue.

"The conclusion which the Land Department reached upon its examination of the character of the grant soon after the passage of the act, was that the title passed to the state at the date of the act. In a communication to the Commissioner of the General Land Office, under date of December 23, 1851, Mr. Stuart, then Secretary of the Interior, referring to the act of 1850 and the act of 1849 to aid Louisiana to drain her swamp lands, and stating that the first question involved was as to the period when the grants took effect—whether at the date of the law, or at the date of the approval of the selections by the Secretary—said: 'In each case, the granting clause is in the first section, and the words employed, viz., "are hereby granted," seem to me to import a grant *in præsenti*. They confer the right to the land, though other proceedings are necessary

to perfect the title. *When the selections are made and approved, or* the patent issued, *the title therefore becomes perfect*, and has relation back to the date of the grant.' And, further, 'As the grants are regarded as taking effect from the date of the laws making them respectively, and as vesting the inchoate title in the states, it follows that any subsequent sale or location of swamp or overflowed lands must be held to be illegal and the purchase money refunded, or a change of location ordered.' Lester's Land Laws, 549, No. 578.

"This construction of the grant has been followed by the Secretary's successors to this day. In a communication to the Commissioner of the General Land Office, April 19, 1877, Secretary Schurz said: 'The legal character of this grant (of 1850) has often been passed upon by the courts, and it has been uniformly held that the act was a present grant, vesting in the state, *proprio vigore* from the day of its date, title to all the land of the particular description therein designated, *wanting nothing but the definition of the boundaries to make it perfect.*' And, therefore, he held that swamp lands were not, in March, 1853, when the pre-emption laws were extended to California, public lands, and for that reason could not be entered and sold under those laws. 'The act of September 28, 1850,' he added, 'was notice to the world that all of the swampy lands in California were thereby granted *in præsenti* to the state, and were not subject to pre-emption, entry or sale thereafter; and the person who files a declaratory statement on lands actually swampy, does so with full notice that they are not public lands and that he cannot obtain any right thereby.' Copp's Public Land Laws, vol. 2, p. 1048.

"In a communication to the Commissioner of February 25, 1886, Secretary Lamar said: 'The principle has been formerly established by the decisions of the courts and of this Department that the grant of swamp lands made to the several states was a grant *in præsenti*, and conferred a present vested right to such lands as of the date of the grant, and that the field notes of survey may be taken as a basis in determining the character of the land if the state so elects.' Decisions of Dept. Interior, vol. 4, 415.

"A similar construction of the grant was given by Attorney General Black in an official communication to the Secretary of the Interior, under date of November 10, 1858. In February, 1853, Congress had made a grant of land to the states of Arkansas and Missouri to aid in the construction of a railroad, and under this grant a part of the lands previously granted to the state of Arkan-

sas by the act of September 28, 1850, under the designation of swamp lands, was included; and the question asked of the Attorney General was, which of the two acts gave the better title. In reply, he said: 'Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the elder one must always prevail; *prior in tempore potior est jure*. This difficulty, therefore, is solved if the mere grant [of 1850], as you call it, gave the State a right to the land from the day of its date. That it did so, there can be no doubt. In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration, I said that a grant by Congress does of itself, *proprio vigore*, pass to the grantee all the estate which the United States had in the subject matter of the grant, except what is expressly excepted. I refer you to that opinion for the reasons and authorities upon which the principle is grounded. *It is not necessary that the patent should issue before the title vests in the State under the act of* 1850. The act of Congress was itself a present grant, wanting nothing but a *definition of boundaries* to make it perfect, and to attain that object the Secretary of the Interior was directed to make out an accurate list and plat of the lands and cause a patent to be issued therefor. *But when a party is authorized to demand a patent for land his title is vested as much as if he had the patent itself, which is but evidence of his title.*' 9 Opinions Attorneys General, 254.

"The same view of the act as a present grant, vesting in the State from its date the title to all the land within its limits of the particular description designated, wanting only a definition of boundaries to render the title perfect, was taken at an early period by the highest courts of several states within which swamp and overflowed lands existed. It was so held by the Supreme Court of Arkansas in 1859, in *Fletcher* v. *Pool*, 20 Ark. 100; in 1866, in *Branch* v. *Mitchell*, 24 Ark. 431, 444; and in 1874 in *Ringo's Executor* v. *Rotan's Heirs*, 29 Ark. 56.

"In *Fletcher* v. *Pool*, the court said: 'That the act was a present grant vesting in the state, *proprio vigore*, from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of boundaries to make it perfect, no doubts can be entertained. *The object of the second section was not to postpone the vesture of title in the State until a patent should issue, but was to provide for the ascertainment of boundaries* and to prevent a premature interference with the lands by the state

legislature before they were *so designated as to avoid mistake and confusion.*'

"In *Branch* v. *Mitchell*, the court said: 'We continue satisfied with the decisions heretofore made; and again hold that all the lands in the state, which were really and in fact swamp and overflowed, and thereby unfit for cultivation, passed to and vested in the State, on the 28th of September, 1850. The case is the same as if the grant had been of all the prairie land, or all the woodland, or all the alluvial land, in the state; the difficulty of ascertainment of its character not affecting the question. The words of grant, the operative words, are direct and positive: "Shall be and the same are hereby granted to the State;" and the provision of the second section, that the Secretary of the Interior should make out and transmit to the governor a list and plats of the land described, and at the request of the governor cause a patent to issue to the State; and that "on that patent the fee simple to said lands shall vest in the said State," can no more be held to limit the effect of the present grant in the first section, *than if, in a deed, after immediate and express conveyance of lands by some general description, it should be provided that, when the numbers should be ascertained, another deed should be made, "on which the fee simple should vest."* This would make the title of the State to any of the land depend on the request of the governor for a patent. The words of the second section must be held to be simply a definition of the *nature* of the title which the State took under the grant, *and not a postponement of the period at which the title should vest.*' 24 Ark. 444, 445.

"And in *Ringo's Executor* v. *Rotan's Heirs*, the court held that the title of the State to the swamp and overflowed lands granted to her by the act of September 28, 1850, accrued from the date of the act, and that a title derived from the State took precedence over a grant by the United States subsequent to that time.

"The same view was held by the Supreme Court of California in 1858, in *Owens* v. *Jackson*, 9 Cal. 322; and in *Summers* v. *Dickinson*, 9 Cal. 554; and in 1864 in *Kernan* v. *Griffith*, 27 Cal. 87; and in 1882 was assumed to be the correct view in *Sacramento Valley Reclamation Co.* v. *Cook*, 61 Cal. 341. In the first of these cases, which was an action for the possession of swamp and overflowed lands held under a patent of the State, the defendant demurred to the complaint, on the ground that it did not show that the land had been surveyed and patented to the State. The demurrer was sustained in the Court below, but the Supreme Court reversed the

decision, holding that the State had the right to dispose of lands of that character granted to her by the act of 1850, prior to the patent of the United States. 'The act of congress,' said the court, 'describes the land, not by specific boundaries, but by its quality, and is a legislative grant of all the public lands within the state of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive as between the United States and the State.' The same conclusion was reached in 1861 by the Supreme Court of Iowa, in *Allison* v. *Halfacre*, 11 Iowa, 450, which was subsequently followed in all its decisions on the subject.

"At a later day, the Supreme Courts of Missouri and Oregon held the same doctrine. *Clarkson* v. *Buchanan*, 53 Missouri, 563; *Campbell* v. *Wortman*, 58 Missouri, 258; *Gaston* v. *Stott*, 5 Oregon, 48. The Supreme Court of Illinois in 1863, expressed the same view in *Supervisors* v. *State's Attorney*, 31 Ill. 68; then receded from it in *Grantham* v. *Atkins*, 63 Ill. 359; and, in 1873, in *Thompson* v. *Prince*, 67 Ill. 281; but returned to its first conclusion, in 1875, in *Keller* v. *Brickey*, 78 Ill. 133.

"The question came before this Court at the December term, 1869, in *Railroad Company* v. *Smith*, 9 Wall. 95, and the same doctrine as to the character of the grant was affirmed. On the 10th of June, 1852, Congress had made to the State of Missouri a grant of land to aid in the construction of certain railroads, and the legislature of the state had conveyed the land to the Hannibal and St. Joseph Railroad Company. One Smith held certain swamp and overflowed lands, which he had obtained from the State, and the question presented was whether the grant to the State in aid of the railroads covered the swamp and overflowed lands granted to her by the act of September 28, 1850, the latter not having been certified to the State by the Secretary of the Interior, nor patented to her. After referring to the first section the Court said: [Here follows the language previously quoted in this brief] . . .

"The Court added, that, as the Secretary of the Interior had no satisfactory evidence under his control to enable him to make out these lists, he must, if he attempted it, rely on witnesses whose personal knowledge would enable them to report as to the character of the tracts claimed to be swamp and overflowed; 'that the matter to be shown was one of observation and examination, and, whether arising before the Secretary, whose duty it was primarily to decide

it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.' And it was held that the grant in aid of the railroads did not include the swamp and overflowed lands.

"In *French* v. *Fyan*, 93 U. S. 169, 170, which was before this court at October term, 1876, the same view was taken of the grant, and the effect to be given to a patent of the United States for swamp lands was stated. That was an action of ejectment for such lands for which a patent had been issued to the State of Missouri under the act of 1850. The lands had been conveyed to the Missouri Pacific Railroad Company by the State as part of the land granted to aid in the construction of its road by the act of June 10, 1862, and the plaintiff had by purchase become vested with the title of the company. To overcome the *prima facie* case made by him, the defendant gave in evidence the patent of the State under the swamp land act of 1850, from which he traced title by regular conveyances. The plaintiff then offered to prove by witnesses who had known the character of the land from 1849 down to the time of the trial, that the land was not swamp and overflowed, and made unfit thereby for cultivation, and that, since 1849, the greater part was not, and never had been, in that condition. The court below held that the question was concluded by the patent of the United States to the State for the land as swamp land under the act of September 28, 1850, and rejected the testimony. The admissibility of the testimony was thus presented for determination. In giving our decision we said: 'This court has decided more than once that the swamp land act was a grant *in præsenti*, by which the title to those lands passed at once to the State in which they lay, except as to the States admitted into the Union after its passage. The patent, therefore, which is the *evidence* that the lands contained in it had been identified as swamp lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to the act granting lands to the State of Missouri for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State under the act of 1850. For, while the title under the swamp land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union when this occurred afterwards, there can be no claim

of an earlier date than that of the act of 1852, two years later, for the inception of the title of the railroad company.' And upon the admissibility of parol testimony to show that the land in the patent was not swamp land, the court said that by the second section of the act the power and duty were conferred upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted, and made his office the tribunal whose decision on that subject was to be controlling. The parol evidence, therefore, was held to be inadmissible. 93 U. S. 172.

"In commenting upon the case of *Railroad* v. *Smith*, upon which reliance was placed for the admission of the parol testimony, the court said: 'The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selections or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act.' . . . 'There was no means,' it added, 'as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant of the State might be defeated by this neglect or refusal of the Secretary to do his duty.'

"This view of the character of the grant was recognized in *Rice* v. *Sioux City and St. Paul Railroad Company*, decided at the October term, 1883, 110 U. S. 695, 697, 698. The question there was, whether the swamp land act extended to territories upon their subsequent admission as states into the Union. It was held that it did not. Said the court, speaking by the Chief Justice: 'That the swamp land act of 1850, operated as a grant *in præsenti* to the States then in existence of all the swamp lands in their respective jurisdictions, is well settled,' citing the cases of *Railroad Company* v. *Smith*, 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169, and *Martin* v. *Marks*, 97 U. S. 345. And again: 'The grant under the act of 1850 was to Arkansas and the other states of the Union. Arkansas was an existing state, and the grant was to all the states *in præsenti*. It was to operate upon existing things, and with reference to an existing state of facts.'—'It was to take effect at once between an existing grantor and several separate existing grantees.'

"The result of these decisions is, that the grant of 1850 is one *in præsenti*, passing the title to the lands as of its date, but requiring *identification* of the lands to render the title perfect; that the action of the Secretary in *identifying* them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible, where the Secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character."

The rules laid down in that case were followed in *Irwin* v. *S. F. Savings Union*, 136 U. S. 578. In the opinion of Mr. Justice Field at Circuit, which is published in the report in this Court, that learned jurist said :

"The Act is a grant *in præsenti* to each State then in the Union of lands situate within its limits of the quality described. Its language is that they 'shall be and the same are hereby granted to said State,' words which import an immediate transfer of interest, and not one in the future. The provisions of the second section making it the duty of the Secretary of the Interior, as soon as practicable after the passage of the Act, to make out an accurate list and plat of the lands described, to transmit the same to the governor of the State, and on his request to cause a patent to be issued to the State; and declaring that 'on that patent the fee simple to the said lands shall vest in the State,' subject to the disposal of the legislature thereof,—*did not prevent the immediate passing of the title.* The patent, with the definite description by metes and bounds of the land which it would furnish, would serve a useful purpose. It would render it unnecessary for the State, or grantees from the State, to make any further proof of the character of the land should any controversies arise respecting it. In many ways, doubts might be created on the subject; the evidence might be conflicting as to whether the greater part of a legal subdivision fell within the description required as being 'wet and unfit for cultivation.' In all such cases the patent would solve the doubt, for the determination in that respect of the Secretary of the Interior would be controlling.

The ascertainment and designation of the lands as those described would be conclusive as against collateral attack. But the title of the State to the lands, they being swamp and overflowed, cannot be defeated, nor in any way impaired, by the delay or refusal of the Secretary of the Interior to have the required list made and patent issued. *The State and her grantees might be embarrassed in the assertion of their rights, but no other consequences would follow.*"

The same doctrines were repeated in *Tubbs* v. *Wilhoit*, 138 U. S. 134.

The same proposition has been repeatedly decided by this Court as to the grants in aid of the Pacific Railroads, *in which patents were expressly provided for.* We will refer to a few of them.

In *Wisconsin Central R. Co.* v. *Price County*, 133 U. S. 496, the Court said:

"So far as the eleven parcels of forty acres each are concerned, the right of the plaintiff to them and to a patent for them had as early as 1877 become complete under the terms of the Granting Act. The line of the railroad had been definitely fixed on the 7th of October, 1869; and the three twenty-mile sections, numbers five, six and seven, were all completed in June, 1877, and supplied with the buildings and appurtenances specified in the Act to entitle the Company to a patent for them from the United States. The title conferred by the grant was necessarily an imperfect one, because, until the lands were *identified* by the definite location of the road, it could not be known what specific lands were embraced in the sections named. The grant was therefore, until such location, a float. But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims. *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 60; *Leavenworth, Lawrence & Galveston R. Co.* v. *United States*, 92 U. S. 733, 741; *Missouri, Kansas & Texas R. Co.* v. *Kansas Pacific R. Co.*, 97 U. S. 491, 496; *St. Joseph & Denver City R. Co.* v. *Baldwin*, 103 U. S. 426, 429. The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the Company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven

forty-acre parcels which were capable of identification, *an indefeasible right or title;* it matters not which term be used. *The subsequent issue of the patents by the United States was not essential to the right of the Company to those parcels,* although in many respects they would have been of great service to it. They would have served to identify the lands as co-terminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the Railroad Company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and therefore a source of quiet and peace to it in its possessions.

"There are many instances in the Reports where such effect as is here stated has been given to patents authorized or directed to be issued to parties, notwithstanding they had previously received a legislative grant of the premises, or their title had been already confirmed. [Quoting from *Langdeau* v. *Hanes, supra.*] We are of opinion, therefore, that these eleven forty-acre parcels were in 1883 subject to taxation by the State of Wisconsin. The lands had become the *property* of the Railroad Company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the Company then had a legal and indefeasible title to the lands, or merely an equitable title to them to be subsequently perfected by patents from the government."

In *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, the Court said:

"In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction, that unless the terms are restricted by other clauses they import a grant *in præsenti*, carrying at once the interest of the grantor in the lands described. *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44; *Leavenworth L. & G. R. Co.* v. *United States*, 92 U. S. 733. . . .

"As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, there-

fore, in the nature of a 'float;' but, *when* the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title *then* attached as of the date of the grant, except as to such parcels as had been in the meantime under its provisions appropriated to other purposes.

"That doctrine is very clearly stated in the Leavenworth case cited above, where the language of the grant was identical with that of the one under consideration, and the court said: [Quoting the language heretofore quoted in this brief.]

"The terms used in the granting clause of the Act of Congress, and the interpretation thus given to them, exclude the idea that they are to be treated as words of contract or promise rather than, as they naturally import, as words indicating an immediate transfer of interest. *The title transferred is a legal title, as distinguished from an equitable or inchoate interest.*

"The case of *Rutherford* v. *Greene*, 15 U. S. 2 Wheat. 196, well illustrates the nature of the title. In 1782 the State of North Carolina passed an Act providing 'that twenty-five thousand acres of land shall be allotted for and given to Major-General Nathaniel Greene,' within the bounds of a tract reserved for the use of the army, to be laid off by commissioners designated in the Act, as a mark of the high sense the State entertained of the extraordinary services of that brave and gallant officer. The commissioners allotted the twenty-five thousand acres, and in 1783 caused a survey of them to be made, and returned to the proper office. One Rutherford claimed under a subsequent entry five thousand acres of the tract, and instituted a suit to establish his claim. The case turned upon the validity of Greene's title, and the date at which it commenced. It was contended by Rutherford's counsel that the words of the Act gave nothing; that they were in the future and not in the present tense; and indicated an intention to give in future, but created no present obligation on the State, nor present interest in General Greene. But the court, speaking by *Chief Justice* Marshall, answered that it thought differently; that the words were words of absolute donation, not indeed of any specific land, but of twenty-five thousand acres in the territory reserved for the officers and soldiers; that as an act of setting apart that quantity to General Greene was to be performed in the future, the words directing it were necessarily in the future tense, but that nothing could be more apparent than the intention of the Legislature *to order the commissioners to make the allotment, and to give the land when allotted to General Greene.* And the court held

that the general gift of twenty-five thousand acres, lying in the reserved territory, became *by the survey* a particular gift of that quantity contained in the survey; and concluded an elaborate examination of the title by stating that it was clearly and unanimously of the opinion that the Act of 1782 vested a title in General Greene to twenty-five thousand acres of land, to be laid off within the bounds allotted to the officers and soldiers, *and that the survey made and returned in pursuance of that Act gave precision to that title and attached it to the land surveyed.* . . .

"But it is contended that the natural import of the granting terms of the Act is qualified and restricted by its fourth section, which, as amended by the Act of 1864, provides that, upon the completion of not less than twenty consecutive miles of the road and telegraph line in the manner required, and their acceptance by the President upon the report of commissioners appointed to examine the work, *patents shall issue* to the company *conveying the right and title* to lands on each side of the road as far as the same is completed.

"The question naturally arises as to the necessity for patents, if the title passed by the Act itself upon the definite location of the road, when the alternate sections granted had become identified. We answer that objection by saying that there are many reasons why the issue of patents would be of great service to the patentees, and by repeating substantially what we said on that subject in *Wisconsin Cent. R. Co.* v. *Price Co.* 133 U. S. 406, 510. *While not essential to transfer the legal right*, the patents would be evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved from the possibility of forfeiture for breach of its conditions. They would serve to identify the lands as coterminous with the road completed; they would obviate the necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would thus be in the grantee's hands deeds of further assurance of his title, and, therefore, a source of quiet and peace to him in its possession."

And the Court adds:

"*A legal title to the sections designated, as distinguished from a merely equitable or inchoate interest, passed to the railroad company by the Act of Congress, upon the definite line of the road being established.*"

And, in *Curtner* v. *U. S.*, 149 U. S. 662, 675, the Court said:

"The grant was *in præsenti*, and attached upon the filing of the map of definite location. When the identification of a granted section became so far complete as to authorize the grantee to take possession, the *legal title* of the granted land passed, and an action for possession could be maintained by the company or its grantees *before the issue of a patent*. The patent would have been evidence that the land named was granted, that the grantee had complied with the conditions of the grant, and that the grant was to that extent relieved from the possibility of forfeiture for breach of its conditions, *but was not essential to transfer the legal right*."

We submit, then, that it is established, if any proposition can be established by judicial decisions, that the requirement of this Act concerning the issuance of patents does not affect or modify the clear words of present grant, and that, as soon as the Secretary has, by the listing, identified the land, the title passes.

3. The effect of identification by the Secretary.

We have shown, by the decisions referred to, that the Act amounted to a present grant, needing nothing but a definition of boundaries to make it perfect, and that the duty of defining those boundaries, or in other words, of identifying the lands granted, was imposed, at least primarily, upon the Secretary of the Interior. It would seem to follow, as a necessary conclusion, that, when the Secretary has, by making and transmitting the "list," so identified the lands, the grant *has* become perfect, and that the *title* has passed, *in the same manner as if they had been specifically identified by the Act*. Such is the purport of the decisions we have cited, and on no other ground could they have been decided as they were decided. They are thus summarized in *Tubbs* v. *Wilhoit*, *supra*:

"It was held that the words 'are hereby granted,' in the Act, imported a present grant, and not a promise of one in the future; and that the title to the lands therefore passed to the State at once, their identification to be made by the action of the Secretary of the Interior, *but when identified* the title to relate back to the date of the Act. . . . The construction thus given to the Act is now the accepted law of the country."

4. The certification by the Secretary gives a vested right to a patent, equivalent to a patent issued.

It follows from what has been said that the only purpose of the machinery provided by the Act was the identification of the granted lands. This identification was to be effected by the Secretary, and he was required to furnish to the State "an accurate list and plats of the lands," and to "cause a patent to be issued to the State therefor." This patent was certainly intended to be issued for the lands described in the list; and therefore the right to have the patent issued accrued immediately upon the making and approval of the list. Such a right is, certainly in equity, equivalent to the patent itself.

In *Stark* v. *Starr*, 6 Wall. 402, 417, the Court said:

"Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. *The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued.*"

In *Barney* v. *Dolph*, 97 U. S. 652, 656, the Court said:

"When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. . . . The execution and delivery of the patent after the right to it is complete are the mere *ministerial* acts of the officer charged with that duty."

The doctrine of these cases was expressly approved in *Simmons* v. *Wagner*, 101 U. S. 260, and applied, *at law*, to defeat a patent subsequently issued to another.

It is, however, wholly unnecessary for the purposes of this case to determine whether the "listing," under this Act, does or does not create a *legal* title. It is sufficient to say that, in this suit in equity, an equitable title is as good as a legal one. That at least an equitable title passed, is unquestionable; and, if anything was left in the United States, it was a dry legal title, which it was bound to convey to the State on request.

5. Upon the listing, the control of the Land Department ceased as to this land.

It is a principle so well settled that we need not refer to authorities to sustain it, that, whenever the title has passed from the United States, the *control* of the Land Department over the land ceases. From that moment, the duties of the officers of that department, if any remain in them, become merely ministerial. Nor does it matter, as a moment's reflection will show, whether the title which has thus passed is the legal title, or merely an equitable one. If the right of the grantee is such that it is the *duty* of the Government to convey to him the legal title, that duty cannot be defeated by the act of any officer of the Government. In equity, the grantee is the owner, and the Government is his trustee.

The case of *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, is precisely analogous to the case at bar. The only difference between the two cases is that, in the *Noble* case, the law made no provision for a patent. That distinction, we submit, we have shown to be unimportant. The principle, as established by the decisions we have cited, is that, when the steps required by law to identify the granted land have been

taken, the grant has attached to the land and become perfect, and that such is the case whether the granting Act does or does not provide for a patent. That being so, the *Noble* case is, in every material respect, the same as the present one. That case is too long for quotation here, and should be read as a whole. We will, however, in view of some suggestions made on the other side, which we will hereafter consider, here quote the concluding portion of that decision:

"With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. . . . The functions of that department necessarily cease when the title has passed from the government.

"We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and *when decided*, and his *approval* was noted upon the plats, the first section of the Act *vested* the right of way in the railroad company. The language of that section is 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an Act was a grant *in præsenti* of lands to be thereafter identified. *Denver & R. G. R. Co.* v. *Alling*, 99 U. S. 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancelation and annulment of an approval thus obtained. *Moffatt* v. *United States*, 112 U. S. 24; *United States* v. *Minor*, 114 U. S. 233. *A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void.* As was said by *Mr. Justice* Grier, in *United States* v. *Stone*, 69 U. S. 2 Wall. 525, 535: 'One officer of the land office is not competent to cancel or annul the act of his predecessor. *That is a judicial act and requires the judgment of a court.*' *Moore* v. *Robbins*, 96 U. S. 530."

The question considered on principle.

One of the most familiar of the canons of construction of statutes is, that regard should be had to the purpose and object of the statute, especially where such purpose is therein expressly declared; and that any construction which tends to defeat that object should be avoided. In this case the Act explicitly sets out its purpose. The first section declares that the grant is made "to enable the State of Arkansas to con- "struct the necessary levees and drains to reclaim the swamp "and overflowed lands therein"; and the second section pro- vides that the proceeds of the granted lands "shall be "applied exclusively, as far as necessary, to the purpose of "reclaiming said lands by means of the levees and drains "aforesaid." It was, therefore, the intention and desire of Congress that the State should reclaim these lands, and, for that purpose, should sell them, if necessary, to obtain the requisite funds. The importance of this reclamation to the public welfare, which induced Congress to make so extensive a grant, supposes also a desire that it should not be impeded by unreasonable delays; and we must therefore presume that Congress intended a speedy adjustment of the grant, in order that its object might be effected. Clearly, if it had been possible to describe the lands specifically in the Act, Con- gress would have done so, and thus left nothing further to be done. This not being possible, the Secretary of the Interior was directed, "*as soon as may be practicable after the passage* "*of this Act,*" to make out and transmit to the State "an "accurate list and plats" of the lands granted. Now, what purpose could be subserved by this list, unless to enable the State to *know*, as soon as possible, the specific description of the granted lands, and, upon that knowledge, to proceed with

their sale for the purpose of reclamation? Since only a definition of boundaries was necessary to make the grant immediately available, the official definition provided for by the Act must have been intended to accomplish that object, and, when made, to perfect the grant. Certainly, it was not intended that everything should wait until patents should be issued; for the direction to make and transmit the list was peremptory and urgent, while patents were to be issued only on the request of the Governor. We think, therefore, that it is palpable that, *at least*, the Act must be construed as if it had said: "There is hereby granted to the State all the lands "which shall be described as swamp and overflowed upon a "list and plats to be made, as soon as practicable, by the "Secretary of the Interior, and by him transmitted to the "State." The Act, no doubt, means more than this; but we do not see how, on any just principle of construction, it could be held to mean less.

Now, on the construction contended for by the Secretary in this case, this requirement of an official list of the lands was utterly nugatory. The Secretary was, it is true, directed to make and transmit such a list; but he contends that no useful purpose was to be subserved thereby. Notwithstanding its making and transmission, the whole matter, according to his theory, remained *in petto;* he might, at any time, reconsider his decision; even his remote successors in office might upset it; their decisions, in turn, might be overturned by their successors, and so *ad infinitum*. Thirty-eight years has elapsed since this grant was made to the State of Oregon; and yet, on his construction, the whole matter is now as open as ever it was; the State has no more means of knowing whether these lands were granted or not, than it had at the date of the Act; and it never can know until he, or some one

of his successors, shall please to issue a patent to the State or to some one adverse to it. Such a construction not only overthrows the constant practice, judicial and ministerial, of nearly fifty years, but it absolutely defeats the expressed object and purpose of the Act, and violates every principle by which the will of the legislature is to be ascertained.

It has been held from the first, as shown by the decisions cited, that the State had the right to dispose of these lands, without waiting for a patent; and that this follows from the declared object of the Act is, we think, evident. That such purchases would be made on the faith of the Secretary's "list", is certain; and the purchasers would have a clear right to so rely on it. (*U. S.* v. *California & Oregon Land Co.*, 148 U. S. 31, 43–45.) It must be, therefore, that Congress intended the decision of the Secretary, evidenced by his approval and transmission of the list, to be a *final decision* as to the character of the land, so far as the Land Department is concerned. If it were not so, it would be impossible for the State to dispose of the lands, and the expressed purpose of the grant would be, in great measure, defeated.

We therefore submit that, on principle as well as on authority, when the Secretary has once, by a "list" made in accordance with law, identified the granted land, the grant becomes at once perfect and indefeasible; and that any subsequent controversy concerning it presents a judicial question, to be decided by the courts and not by the Land Department.

Some suggestions of the defendant in reply to these positions we will examine after discussing the case of *Michigan Land & Lumber Co.*, v. *Rust.*

The case of Michigan Land & Lumber Co. v. Rust.

We have already said that the decision of the question here presented was not necessary for the determination of that case. A brief statement of the facts will make this clear, and will conduce to a better understanding of the opinion.

Certain of the public land surveys in the State of Michigan were erroneous, if not actually fraudulent. While proceedings were pending for resurveys, the Secretary, probably through inadvertence, made out and transmitted to the State a list of lands shown to be swamp by those erroneous surveys. That extensive frauds in the surveys in that State were known to its Legislature, was shown by a resolution which it passed, reciting that large districts of lands had been returned by the deputy U. S. surveyors as surveyed "where no surveys what-"ever had been made, or where the surveys have been so "imperfectly done as to be utterly valueless"; and requesting the President to cause resurveys to be made. Upon such resurveys, the lands in question were found not to be swamp lands; and thereupon new lists were made out accordingly and accepted by the State. The decision in the case was finally made to turn on two propositions: That the State had accepted the re-adjustment; and that, when the surveys, on which the former list depended, had been set aside, nothing was left to support it. That this last proposition, though not directly stated in the opinion, is implicitly contained in it, and was one of the foundations of the judgment, is shown by the discussion as to the confirmatory Act of 1857. (Pp. 599–604.)

Premising this, we here quote so much of that opinion as relates to the point now under discussion. The Court said:

"This case involves questions of the power of the Land Department over the matter of the identification of the particular lands passing under the swamp land act of 1850, of the finality of the action of the Secretary of the Interior in approving and certifying to the governor of the state a list of such lands, and of the effect of the confirmatory act of 1857. There is no testimony showing what was in fact the condition of the land, whether swamp or not, at the time of the passage of the act of 1850, and the case turns wholly upon the documentary evidence.

"The act of 1850 made a grant *in præsenti;* in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of *identification. Hannibal & St. J. Railroad Co.* v. *Smith*, 76 U. S. 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169; *Martin* v. *Marks*, 97 U. S. 345; *Rice* v. *Sioux City & St P. Railroad Company*, 110 U. S. 695; *Wright* v. *Roseberry*, 121 U. S. 488; *Tubbs* v. *Wilhoit*, 138 U. S. 134. But while the act operated as a grant *in præsenti*, the determination of what lands were swamp lands was intrusted to the Secretary of the Interior. Section 2 contains this provision: [Quoting that section.]

"It may be remarked in passing that while the 1st and 2d sections refer specially to the state of Arkansas, § 4 of the act makes it applicable to all the states. It is true that in the 1st section Congress defines the lands granted as 'swamp and overflowed lands, made unfit thereby for cultivation;' and § 3, referring to the lists and plats ordered by § 2 to be made out by the Secretary of the Interior, contains this further specification as to the character of the lands granted:

"'That in making out the list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said lists and plats; but when a greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.'

"But while Congress thus defined what it intended to grant as swamp and overflowed lands, it intrusted, as appears from § 2, the identification of those lands to the Secretary of the Interior.

"It will be perceived that the act contemplated the issue of a patent as the means of transferring the legal title. In *Rogers Locomotive Mach. Works* v. *American Emigrant Company*, 164 U. S. 559, 574, it was said, speaking in reference to this matter, and after a full review of the previous authorities: 'When he [that is, the Secretary

of the Interior] made such identification, then, and not before, the state was entitled to a patent, and "on such patent" the fee-simple title vested in the state. The state's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued.'

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother* v. *Lucas*, 37 U. S. 12 Pet. 410, 454; *Grignon's Lessee* v. *Astor*, 43 U. S. 2 How. 319; *Chouteau* v. *Eckhart*, 43 U. S. 2 How. 344-372; *Glasgow* v. *Hortiz*, 66 U. S. 1 Black, 595; *Langdeau* v. *Hanes*, 88 U. S. 21 Wall. 521; *Ryan* v. *Carter*, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title (Rev. Stat. § 2449; *Frasher* v. *O'Connor*, 115 U. S. 102), but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent (*Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 426-450); and while so remaining, the grant is in process of administration, and the jurisdiction of the Land Department is not lost.

"It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing to determine the question whether or not such title has passed. *Cornelius* v. *Kessel*, 128 U. S. 456; *Orchard* v. *Alexander*, 157 U. S. 372-383; *Parsons* v. *Venzke*, 164 U. S. 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. 'A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination.' *Miller* v. *Kerr*, 20 U. S. 7 Wheat. 1, 6. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. *Stone* v. *United States*, 69 U. S. 2 Wall. 525, 535; *Moore* v. *Robbins*, 96 U. S. 530; *United States* v. *Schurz*, 102 U. S. 378-396; *Bucknell* v. *Comstock*, 113 U. S. 149, 151; *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286; *Williams* v. *United States*, 138

U. S. 514. This jurisdiction of the department has been maintained in cases of pre-emption where the entire purchase money has been paid and a receiver's final certificate issued. *Orchard* v. *Alexander*, 157 U. S. 372, and cases cited in the opinion; *Parsons* v. *Venzke*, 164 U. S. 89."

The Court then proceeds to quote from *Knight* v. *United Land Association*, and other similar cases, and concludes as follows:

"So, notwithstanding that a survey had been made and that such survey indicated that the land in controversy was swamp land, and therefore passing under the act of 1850 to the state of Michigan, it was within the power of the Land Department, at any time prior to the issue of a patent, of its own motion, *to order a resurvey*, and correct by that any mistakes in the prior survey."

It will be seen that, as we have said, the conclusion of the Court on this point is made to depend entirely upon the provision in the Act of 1850 providing for the issuance of patents. We have already shown that this view is opposed to the whole course of decision in this Court, and to the obvious meaning of the act. We shall proceed to show that the authorities cited by the Court in support of that view do not sustain it.

The cases cited directly to that point are two: *Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559, and *Bagnell* v. *Broderick*, 13 Pet. 436. Neither of those cases is an authority on this point.

In the former case, which arose under the Swamp Land Act, the Secretary *had never listed* or otherwise identified the lands *as swamp*, but, on the contrary, had listed them under a railroad grant; and the only question was *whether the railroad list could be overcome by parol evidence that the lands were swamp.* The court held such evidence inadmissible, *on the ground that the listing was a conclusive*

determination that the lands were not swamp. It is evident, therefore, that the effect of the clause in the Act as to patents was not in question in that case, and could not have been decided. It is true that the Court said, *arguendo*, (p. 574,) "The state's title was at the outset an inchoate one, "and did not become perfect, as of the date of the act, until "a patent was issued." This language is, of course, mere *dictum;* but it is evident that the Court, in using it, had no such idea as is now contended for. In the sentence immediately preceding, the Court had said, "*When he had made* "*such identification*, then, and not before, *the state was entitled* "*to a patent.*" And (p. 570) it had also said, "While, there- "fore, as held in many cases, the act of 1850 was *in præsenti*, "and gave an inchoate title, the lands needed to be *identified*, "as lands that passed under the act; *which being done*, and "not before, *the title became perfect* as of the date of the grant- "ing act." (Citing *Wright* v. *Roseberry* and other cases.) It is plain, therefore, that the Court did not intend to be understood as saying that at least a perfect equitable title did not pass upon the listing, nor that it was thereafter within the power of the Secretary to divest that title.

Bagnell v. *Broderick* is, if possible, still less in point. That was an action in ejectment. Both parties claimed under a "New Madrid Certificate" which had been issued to one Robertson. A patent had been issued to Robertson upon that certificate, and the plaintiff deraigned title under that patent. The defendant sought to defeat the patent by proof that, as between him and Robertson, he was the equitable owner of the certificate and that the patent should have been issued to him. The Court held that such proof was inadmissible at law, and that the defendant's remedy, if any, was in

equity. Nothing else was decided or intimated in that case; and it is absolutely barren of the slightest suggestion on the question here at issue, unless it be the language on page 451, which says that the patent is "the superior and conclusive "evidence of legal title," and "until it issues, the fee is in "the government." Apart from the fact that those words had nothing to do with the question in that case, they have no application here; for the Act there construed contained no present grant, but merely authorized the sufferers from certain earthquakes to "locate" lands in lieu of the lands destroyed. Their rights were, therefore, identical in substance with those of pre-emption and homestead claimants, and subject to similar rules.

These, as we have said, are the only cases cited by the Court in the case now under consideration, as direct authority to the proposition that, under the swamp land Act, the lands remain within the control of the Department until patent. That they are no authority for so holding is obvious. The Court, however, refers to certain other cases as, in some measure, supporting that doctrine. They are *Cornelius* v. *Kessel*, 128 U. S. 456; *Orchard* v. *Alexander*, 157 U. S. 372; *Parsons* v. *Venzke*, 164 U. S. 89; and *Knight* v. *United Land Association*, 142 U. S. 161. The only question involved or considered in those cases was as to the supervisory power of the Secretary of the Interior *over the acts of his subordinate officers*. All that they decide was that no act of any such *subordinate officer* could be considered final, in such sense as to be beyond the control of the Secretary. This is so, because the Secretary is the head of the Department, and, as such, has been vested by Congress with general supervisory powers. Such cases, of course, can have no application where, as here, *the Secretary himself* has performed an act required by law.

The question whether that act is final or not, cannot be solved by considering his *supervisory* power. It is significant in this connection that, in *Orchard* v. *Alexander*, (p. 384,) the Court very strongly intimated, if it did not expressly decide, that, if the section of the pre-emption law declaring that proof of settlement and improvement should be made to the satisfaction of the local land officers, had stood alone, their decision would be final. The Court said: "It was competent "for Congress to give finality to their determinations, *and* "*having given them the power to determine, and made no pro-* "*vision for any review, it naturally followed that their judg-* "*ment was final.*"

The Court also refers to *Miller* v. *Kerr*, 7 Wheat. 1, as holding that, before patent, "the person who acquires an "equity holds a right subject to examination." The Court, in using that language, referred merely to an examination *by a court:* and it did not, and could not in that case, decide anything about an examination by the Department, for there was no such question there.

We have thus considered all the cases cited in the *Michigan Land & Lumber Co.'s* case which could possibly be supposed to bear on this particular question; and we believe that the Court, upon reflection, will agree with us that they furnish no support to that decision, much less any ground for departing from an old and well-established rule. We are not prepared to say that the *judgment* in that case was not right upon the merits. All that we claim is that it did not need or depend on a decision of this question, and that the court was in error in these particular views.

After all, is it not perfectly plain that a consideration of the powers of the Land Department under the pre-emption,

homestead, and kindred statutes, can afford no analogy in cases arising under Acts of direct grant? When Congress *grants* lands, they become the property of the grantee; and the Land Department can have no jurisdiction over them, except such as is expressly conferred by the granting Act. It is conceded on all hands that, if this Act had made no reference to a patent, the *legal title* would have passed immediately upon the listing. How the provision for a patent can affect the question here, we cannot understand. The question is not whether the State, before patent, has a strictly legal title. It is merely whether the *identification* of the lands by a *list* made according to the Act, does not perfect the grant *so that the State is then absolutely entitled to a patent.* If it is so absolutely entitled, no officer of the Government can deprive it of that right.

The defendant's contentions.

The principal argument made on behalf of the defendant in the court below was that the Secretary has at any rate the power to set aside a listing procured by *fraud*, and that, as the bill does not show the grounds upon which Secretary Vilas acted, the Court has a right to presume that he did cancel the list issued by Secretary Teller, on that ground. Even if the premise so assumed were correct, the conclusion contended for would not follow.

We have shown, and we believe the Court will hold, that the Secretary has no *general* power to set aside such a list. If it be true that he has such power in cases of fraud, that is an exception to the general rule. He who relies on an exception, must plead it; and especially is this the case when the existence of the exceptional fact is necessary to confer jurisdiction. Fraud is never, under any possible circumstances,

presumed: and the case made by the bill, therefore, *prima facie* entitles the plaintiff to relief. If, then, the existence of fraud would warrant the Secretary in setting aside the list, the defendant should set up such fact by answer. Since, on no view of the case, can it be claimed that the Secretary has any *arbitrary* power in the premises, (*Cornelius* v. *Kessel*, *supra*,) he could not defend by a mere *pretense* of fraud. If fraud is relied on in support of his action, it would be for the Court to say whether or not it existed, in such a sense as to confer upon him any such power. The existence of such fraud cannot be presumed on demurrer.

But we deny the correctness of the premise thus assumed. The moment it is admitted, as we think it must be admitted, that the listing conferred upon the State a *right* equivalent to a patent, it follows that the Secretary can no more set aside a list on the ground of fraud, than he could cancel a patent for that reason. "That presents a *judicial* question, and requires the judgment of a court." That proposition was so fully discussed and decided in *Noble* v. *Union River Logging R. Co.*, *supra*, that we need do no more than refer the Court to the opinion in that case on that point. We are unable to see how the slightest distinction can be drawn between that case and this. .

In saying this, we desire to limit our proposition to the power of the Secretary. We say that *he* has not the power to act *judicially* in that matter, and thus *conclude* the rights of the plaintiff. The question of fraud is one pre-eminently to be judged of by a court. Where a party has no vested rights, as against the United States, the land officers may, and must in many cases, hear and determine charges of fraud. But where such rights have once vested,

to permit the Land Department to divest them on the alleged ground of fraud, would be contrary to the fundamental distinctions between the functions of the different departments of government. Besides being a mere ministerial officer, the Secretary of the Interior has no power to compel the attendance of witnesses or the production of papers, nor the necessary judicial machinery to determine the equitable defenses of *bona fide* purchase and the like. Before such a tribunal, the parties would be well-nigh powerless, and the greatest injustice might be, and probably would be, done. Surely, such a power, not conferred either expressly or by any necessary implication, should not be inferred to exist, without a stronger warrant than has been asserted before this Court. We therefore submit that no such question can arise in this case. If any fraud has been practiced, it is competent for the Government to maintain a suit in equity to cancel the list on that ground. In such a suit, and only in such a suit, can the rights of both parties be adequately protected. But the Government, having granted the land, has no more power to be the judge in its own case, than a private grantor would have. Like any other party to a contract, it must submit its rights to the judgment of the courts.

We therefore respectfully submit that the decree of the Court of Appeals should be reversed, with directions to that court to reverse the decree of the Supreme Court of the District.

Respectfully submitted,

CHARLES A. KEIGWIN,
Solicitor for Appellant.

W. B. TREADWELL,
Of Counsel.